

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Petition of Vaya Telecom, Inc. For
Declaratory Ruling Regarding LEC-to-LEC
VoIP Traffic Exchanges

CC Docket No. 01-92

COMMENTS OF
WASHINGTON INDEPENDENT TELECOMMUNICATIONS ASSOCIATION
COLORADO TELECOMMUNICATIONS ASSOCIATION
IDAHO TELECOM ALLIANCE
MONTANA TELECOMMUNICATIONS ASSOCIATION
OREGON TELECOMMUNICATIONS ASSOCIATION

October 6, 2011

INTRODUCTION AND SUMMARY

The Washington Independent Telecommunications Association, Colorado Telecommunications Association, Idaho Telecom Alliance, Montana Telecommunications Association and Oregon Telecommunications Association (for purposes of these Comments, the Associations will be collectively referred to as the Western Associations) are filing these Comments to address the Petition of Vaya Telecom, Inc. (Vaya) for a Declaratory Ruling regarding efforts to collect access charges on LEC-to-LEC traffic exchanges. Specifically, the traffic in question in the Petition originates as a VoIP transmitted call and terminates as a traditional long distance call. The Commission established the comment cycle in Public Notice DA 11-1561 issued September 20, 2011. Comments are due October 6, 2011.

The vast majority of the member companies in the associations that comprise the Western Associations are rural incumbent local exchange carriers that serve the high cost and hard to serve areas in their respective states.¹ As a general proposition, these companies do not have available to them the economies of scope and scale that may be available to larger companies. These rural independent local exchange companies bring excellent service to their rural communities and do so with the support of the existing universal service and current intercarrier compensation mechanisms. However, the landscape is changing, and the members of the Western Associations recognize the change must come.

It is the Western Associations' position that Vaya's Petition is not well founded. By its own admission, Vaya is terminating voice traffic to the public switched telecommunications network (PSTN) for termination to the called party, just as any other long distance call would be delivered to the PSTN of the terminating local exchange company (LEC) for call termination.

¹ A list of member rural independent local exchange companies for each Association is set out in Appendix A.

The facilities of the LEC are being used in the same way as its facilities would be used for any other long distance call delivered by an interexchange carrier (IXC) to the terminating LEC for call termination. It is the Western Associations' position that access charges are appropriate and should apply. If access charges do not apply to this traffic terminated on the PSTN, the intercarrier compensation system will likely be brought to a complete collapse.

DISCUSSION

Vaya seeks a declaratory ruling that LECs are engaging in unlawful activity if they attempt to collect intrastate access charges for telecommunications messages that are terminated to the LEC's customers. Vaya argues that such traffic should be treated under the Commission's orders for treatment of ISP-bound traffic, making the LEC-to-LEC traffic jurisdictionally interstate. Vaya further asserts that the LEC-to-LEC traffic is subject to Section 251(b)(5) of the Telecommunications Act and is not subject to intrastate access charges.²

Vaya asserts that it receives IP-based traffic from a variety of companies in Internet protocol (IP) format, including both nomadic and fixed VoIP service providers, over the Internet. Vaya then claims it provides an IP to PSTN protocol conversion service and sends the traffic to the PSTN for delivery to the intended recipient.³ The Western Associations will assume for purposes of these Comments that this is an accurate description of how Vaya functions. However, the Western Associations are skeptical that it is actually the case because for other

² Petition of Vaya at p. 1 and throughout.

³ Petition of Vaya at p. 2.

providers claiming to act as Vaya, it has been found not to be the case.⁴

Vaya argues that the traffic it provides fits within the concepts of ISP-bound traffic and the Commission's precedent in that area should apply.⁵ It is important to keep in mind that the Commission's orders regarding ISP-bound traffic are related to dial-up traffic that is destined to an ISP server. That ISP server can then send that traffic all over the world, obtaining and transmitting the data that the person who initiated the Internet-bound call wants to retrieve from web sites that may be located within the state where the ISP is located or in another state or on the other side of the world. That is markedly different than a call that terminates to a specific location for the purpose of voice communication, not data transmission.

The following hypothetical might help illustrate this point. Assume that a retired mother of two is living on her own in Tenino, Washington. Her two children both live in Seattle, Washington. A call from Seattle to Tenino is a long distance call that is subject to terminating access if it is delivered by an IXC. Further assume that the daughter has local phone service in Seattle from the ILEC, which is CenturyLink. Further assume that she has chosen AT&T as her long distance service provider. That means AT&T is the IXC that the long distance traffic is delivered to when she makes a 1+ long distance call and AT&T delivers the call to Tenino. Assume that the woman's son lives next door to the daughter in Seattle. However, the son has signed up for service with Comcast for his local and long distance phone service. Thus, it is

⁴ See, for example, the ex parte filed on behalf of TDS Telecom, the National Exchange Carrier Association, National Telecommunications Cooperative Association, the Organization for the Promotion and Advancement of Small Telecommunications Companies and the Missouri Small Telephone Company Group concerning the activities of Halo Wireless, Inc. and Transcom dated September 22, 2011. See, also, Request for Expedited Declaring Ruling as to the Applicability of the Intrastate Access Tariffs of Blue Ridge Telephone Company, Citizens Telephone Company, Plant Telephone Company, and Waverly Hall Telephone LLC to the Traffic Delivered to Them by Global NAPs, Inc., Docket No. 21905-U, Georgia Public Service Commission, Initial Decision (April 8, 2008) and Order Adopting in part and Modifying in part the Hearing Officers' Initial Decision (July 31, 2009).

⁵ Ibid.

Comcast that will deliver the call to the Tenino PSTN⁶ when the son makes a call to Tenino.

Under this scenario, both the daughter and the son make a call to their mother. The call travels the same distance. In one case, the call originates on the PSTN and terminates on the PSTN. In the other case, the call originates as a VoIP modem-based call, but terminates on the PSTN in Tenino. In both cases, the Tenino Telephone Company's facilities are used in exactly the same way. The call is delivered to Tenino at its meet point. The Tenino trunks are used to take it to the Tenino switch. The Tenino switch then takes that traffic and delivers it to the children's mother. In one case, the IXC pays terminating access charges. In the other case, under Vaya's Petition, no access charges would be paid. How is that fair? How is that equitable? And, how would that not lead to the complete collapse of intercarrier compensation?

As an example of how Vaya's proposed approach is discriminatory in another sense, assume that there is a small business located in Paonia, Colorado which is served by TDS Telecom. That small business receives orders for services by telephone. Assume that there are two customers of that small business in Denver, Colorado. One customer uses an IXC for which for purposes of this example is labeled IXC-A. The other customer uses IXC-B. Both customers call from a TDM-based landline phone. IXC-A takes that TDM call, converts it to IP and delivers it to Vaya. IXC-B takes the TDM call and delivers it over its own facilities. Both calls are delivered to the tandem that TDS Telecom is served by. Both calls are delivered to the tandem as TDM. Vaya will have converted what it received as IP to TDM so that the call can be transported through the tandem. Under Vaya's approach, the IXC-A delivering traffic to it would not have to pay terminating access charges, while IXC-B would pay terminating access charges.

⁶ The call is actually delivered to a tandem on the PSTN and then to Tenino, but the point is the same.

Such a result would be clearly discriminatory and provide an unreasonable preference for one form of transmission over another form of transmission.⁷

The fact that the VoIP traffic uses the PSTN on the terminating end of the call in exactly the same way as any other call terminating on the PSTN was pointed out quite clearly in the Comments of the Rural Associations submitted April 1, 2011.⁸ As stated beginning at the bottom of Page 9 of their Comments, the Rural Associations explain as follows:

Since, from the PSTN perspective, such calls [VoIP] originate or terminate and connect to other stations on the PSTN in exactly the same manner as non-IP calls, there is no logical basis for exempting them from applicable intercarrier compensation mechanisms simply on the basis that different technology is used by the VoIP provider to route the call to or from the customer. There are no such exemptions for calls that are carried over different transport mediums such as copper, fiber, coaxial cable or microwave. Neither are there exemptions for traffic routed by different switch technology types such as analog, digital, or even softswitch. There is similarly no justification for an exemption based on IP transmission technology.⁹

Indeed, the Commission itself has stated that VoIP service is virtually indistinguishable from traditional telephone service from a customer's perspective. For example, the following statement was made in IP Enabled Services, WC Docket No. 04-36, Report and Order, 24 FCC Rcd 6039 (2009) at ¶ 12: "... interconnected VoIP service is functionally indistinguishable from traditional telephone service." The concept that VoIP service is functionally the same as

⁷ In its Petition at p. 3, Vaya states "First, it is well-settled that traffic that is exchanged by LECs that implicates the Internet is jurisdictionally interstate traffic based on the commission's end-to-end analysis." This suggests that Vaya is taking the position that TDM traffic that is converted to IP and then uses the Internet is somehow exempt from access charges when it is converted back to TDM for call termination.

⁸ Comments of the National Exchange Carrier Association, Inc.; National Telecommunications Cooperative Association; Organization for the Promotion and Advancement of Small Telecommunications Companies; Western Telecommunications Alliance; Eastern Rural Telecom Association; The Rural Alliance; and The Rural Broadband Alliance submitted April 1, 2011, In the Matter of Connect America Fund, WC Docket No. 10-90, A National Broadband Plan for Our Future, GN Docket No. 09-51, Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket No. 07-135, High-Cost Universal Service Support, WC Docket No. 05-337, Developing an Unified Intercarrier Compensation Regime, CC Docket No. 01-92 (Rural Associations Comments).

⁹ Rural Associations Comments at p. 9-10.

traditional service to the customer has been carried through other Commission discussions as well.¹⁰

As the Rural Associations have pointed out, taking the position that Vaya advocates would collapse existing intercarrier compensation mechanisms and would discriminate in favor of one form of transmission technology over all other forms of transmission technology. As stated in the April 1, 2011, submission by the Rural Associations:

Indeed, if the Commission were to find now that VoIP traffic should be subject to a very low or "zero" rate, it might as well cease all further ICC reform activity - at that point, the Commission would have effectively ceded the ICC reform field to the arbitrageurs. Specifically, in the wake of any such ruling, nearly every minute of traffic on the PSTN would undoubtedly be asserted as "VoIP," and thus claimed as subject to the lower (or zeroed-out) rates. Even if such claims were proven to be untrue, the resulting turmoil, disputes, delay, and litigation from such claims would only tie the ICC system up in greater knots than it already is today. Such "reform" would also accelerate the already painful amount of pressure on the USF, as carriers would need to look to the USF for greater cost recovery given the statute's mandate for reasonable comparability in services and rates. The only sensible path forward - one that is consistent with law, based upon sound policy, and ensures that "reform" does not spiral out of the Commission's control - is to subject VoIP traffic to the same intercarrier compensation rules as all other traffic, pending a more comprehensive reform effort *that is under the Commission's - and not the arbitrageurs' - control*. (Emphasis in the original and footnotes omitted.)¹¹

The Rural Associations go on to conclude:

In short, treating a minute of VoIP traffic differently from any other minute of traffic traversing the PSTN will take control of ICC reform entirely out of the Commission's hands and leave it instead at the whim of providers who will self-declare traffic as VoIP and dare others to prove the contrary. The Commission should avoid such a result and retain control of its reform initiatives by moving toward unification of rates for *all* traffic - including VoIP traffic - at a pace to be

¹⁰ The fact that the services are indistinguishable no matter which medium is used has also been the Commission's statements in Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Propriety Network Information and Other Customer Information, CC Docket No. 96-115, IP-Enabled Services, WC Docket No. 04-36, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927 (2007) at ¶ 56. See, also, Assessment and Collection of Regulatory Fees for Fiscal Year 2007, ND Docket No. 07-81, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15712 (2007) at ¶ 18.

¹¹ Rural Associations Comments at p. 5-6.

determined by policymakers rather than arbitrageurs. (Emphasis in original and footnotes omitted.)¹²

If Vaya's Petition is granted, virtually all traffic would immediately be claimed to be IP-originated traffic.

Vaya premises its argument that access charges do not apply to IP-originated traffic or "Internet implicated" traffic on the concept that because the Internet is used in the transmission of the traffic, it falls under the Commission's ISP-bound traffic orders.¹³ In its argument in the Petition, Vaya cites to the Commission's passage in an ISP-bound traffic order that ISP-bound traffic should be analyzed for jurisdictional purposes as a continuous transmission from the originating end user to a distant Internet site.¹⁴ This passage underscores why Vaya is misguided. The ISP-bound traffic involved in the Commission's ISP-bound traffic cases is traffic seeking data transmission from Internet web sites around the world. These orders do not involve using the Internet as a transmission mechanism for voice communication to one particular called party. ISP-bound traffic is different than IP-originated traffic.

The Ninth Circuit Court of Appeals has clearly approved this obvious distinction. That Court found that the clear purpose of the ESP exemption from access charges does not apply to VoIP transmission. The Court upheld the California PUC which pointed out the distinction: "...the only relevant exemption from the access charge regime under Federal law is for ISP-bound traffic rather than ISP-originated traffic." Cox California Telecom, LLC v. GNAPS, Case

¹² Rural Associations Comments at p. 14-15.

¹³ Vaya cites to High-Cost Universal Service Support, WC Docket No. 05-337, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Lifeline and Link Up, WC Docket No. 03-109, Universal Service Contribution Methodology, WC Docket No. 06-122, Numbering Resource Optimization, CC Docket No. 99-200, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, IP-Enabled Services, WC Docket No. 04-36, Order FCC 08-262, 24 FCC Rcd 6475 (2008) (Core Mandamus Order).

¹⁴ Vaya Petition at p. 4 citing to Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket 99-68, 14 FCC Rcd 3689, ¶ 13 (1999).

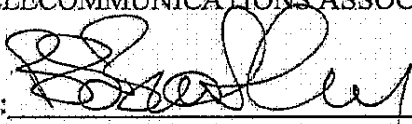
06-04-026, Opinion Granting Complainant's Motion for Summary Judgment, at 5 (California PUC, January 11, 2007), aff'd. sub. nom. Global NAPS, Inc. v. PUC of the State of California, 624 F.3d 225 (9th Cir. 2010). Vaya's argument is unfounded.

CONCLUSION

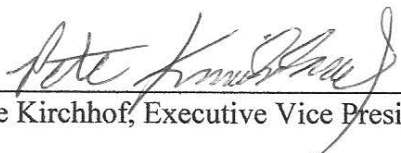
In its Petition, Vaya is asking the Commission to bless its arbitrage practices. Vaya is asking the Commission to give it and other VoIP providers an economic advantage which discriminates against all other forms of transport. Such an action would be contrary to the Commission's own prior decisions and would create potential economic disaster for small rural companies that would be required to terminate IP-originated traffic over the PSTN without compensation. If Vaya's Petition is granted, all traffic will quickly be claimed to be IP-originated traffic. The Western Associations request that the Petition be denied.

Respectfully submitted this 6th day of October, 2011.

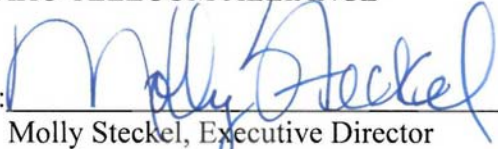
WASHINGTON INDEPENDENT
TELECOMMUNICATIONS ASSOCIATION

By: 
Betty Buckley, Executive Vice President

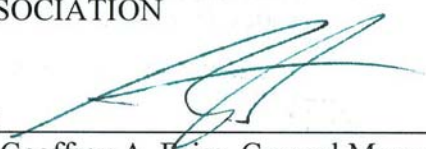
COLORADO TELECOMMUNICATIONS
ASSOCIATION

By: 
Pete Kirchhof, Executive Vice President

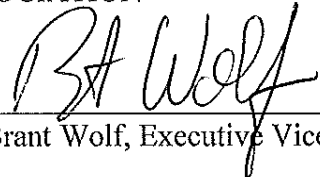
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ASSOCIATION

By: 
Geoffrey A. Feiss, General Manager

OREGON TELECOMMUNICATIONS
ASSOCIATION

By: 
Brant Wolf, Executive Vice President

APPENDIX A

Washington Independent Telecommunications Association

Asotin Telephone Company d/b/a TDS Telecom
*CenturyTel of Cowiche, Inc., d/b/a CenturyLink
*CenturyTel of Inter-Island, Inc., d/b/a CenturyLink
*CenturyTel of Washington, Inc., d/b/a CenturyLink
Ellensburg Telephone Company d/b/a FairPoint Communications
Frontier Communications Northwest Inc.
Hat Island Telephone Company
Hood Canal Telephone Co., Inc. d/b/a Hood Canal Communications
Inland Telephone Company
Kalama Telephone Company
Lewis River Telephone Company, Inc. d/b/a TDS Telecom
Mashell Telecom, Inc. d/b/a Rainier Connect
McDaniel Telephone Co. d/b/a TDS Telecom
Pend Oreille Telephone Company, d/b/a RTI Pend Oreille Telecom
Pioneer Telephone Company
St. John Co-operative Telephone and Telegraph Company
Tenino Telephone Company
The Toledo Telephone Co., Inc.
Western Wahkiakum County Telephone Company d/b/a Wahkiakum West
Whidbey Telephone Company
YCOM Networks, Inc. d/b/a FairPoint Communications

Colorado Telecommunications Association

Agate Mutual Telephone Cooperative Association
Big Sandy Telecom (FairPoint)
Blanca Telephone Company
*CenturyLink
Columbine Telephone Company (FairPoint)
Delta County Tele-Comm (TDS Telecom)
Dubois Telephone Exchange
Eastern Slope Rural Telephone Association
Farmers Telephone Company
Haxtun Telephone Company
Nucla-Naturita Telephone Company
Nunn Telephone Company
Peetz Cooperative Telephone Company
Phillips County Telephone
Pine Drive Telephone Company
Plains Cooperative Telephone Association
Rico Telephone Company
Roggen Telephone Company
Rye Telephone Company
South Park Telephone Company
Stoneham Cooperative Telephone Company
Strasburg Telephone Company (TDS Telecom)
Sunflower Telephone Company (FairPoint)
Union Telephone company
Wiggins Telephone Association
Willard Telephone Company

*CenturyLink is filing its own comments separately from the Western Associations in this matter.

Idaho Telecom Alliance

Albion Telephone Company
Cambridge Telephone Company
Custer Telephone Cooperative
Direct Communications
Farmers Mutual Telephone Company
Filer Mutual Telephone Company
Fremont Telecom Company (dba FairPoint
Communications)
Inland Telephone Company
Midvale Telephone Exchange
Oregon-Idaho Utilities
Project Mutual Telephone Company
Rural Telephone Company
Silver Star Communications

Montana Telecommunications Association

3 Rivers Telephone Cooperative
Blackfoot Telephone Cooperative
*CenturyLink of Montana
Hot Springs Telephone Company
Lincoln Telephone Company
Range Telephone Cooperative
Ronon Telephone Company
Southern Montana Telephone Company

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Oregon Telecommunications Association

Asotin Telephone Company d/b/a TDS

Telecom

Beaver Creek Cooperative Telephone

Company

Canby Telephone Association d/b/a Canby

Telecom

Cascade Utilities, Inc., d/b/a Reliance Connects

*CenturyTel of Oregon, Inc., d/b/a

CenturyLink

*CenturyTel of Eastern Oregon, Inc., d/b/a

CenturyLink

Clear Creek Telephone & Television

Colton Telephone Company, d/b/a ColtonTel

Eagle Telephone System, Inc.

Frontier Communications Northwest, Inc.

Gervais Telephone Company

Helix Telephone Company

Home Telephone Company d/b/a TDS

Telecom

Midvale Telephone Exchange

Molalla Communications, Inc. d/b/a Molalla

Communications

Monitor Cooperative Telephone Company

Monroe Telephone Company

Mt. Angel Telephone Company

Nehalem Telecommunications, Inc., d/b/a RTI

Nehalem Telecom

North-State Telephone Co.

Oregon-Idaho Utilities, Inc.

Oregon Telephone Corporation

People's Telephone Co.

Pine Telephone System, Inc.

Pioneer Telephone Cooperative

Roome Telecommunications Inc.

St. Paul Cooperative Telephone Association

Scio Mutual Telephone Association

Stayton Cooperative Telephone Company

Trans-Cascades Telephone Company, d/b/a

Reliance Connects

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